

**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION INTERIM NO. 97-0007**

ISSUE: What are the ethical obligations of an attorney assigned to represent indigent clients who believes that his caseload is too large, and the resources available to him are insufficient, to permit him to represent his clients competently?

DIGEST: Each attorney has a duty to represent the attorney's clients competently. If an attorney is ordered to trial despite his belief that in the circumstances it is impossible to provide competent representation, the attorney nevertheless is required to obey the court's order and defend each client zealously within the bounds of the law. In addition, because the attorney has the same duty of loyalty to each client, the attorney may not sacrifice the defense of any one client in order to focus on the defense of other clients, or in order to protest the level of available resources, even if the attorney believes it is in the best interests of a greater number of other or future clients to do so.

AUTHORITIES

INTERPRETED: Rules 3-110, 3-500, and 3-700 of the Rules of Professional Conduct of the State Bar of California.

STATEMENT OF FACTS

Attorney X is employed as an assistant public defender in California. He believes that his caseload is too large, and that he has insufficient investigators and experts available to aid him in trial preparation, so that he cannot adequately represent his clients. His trial schedule leaves him with little time to prepare any single case for trial, and he is continuously set for numerous trials. He finds himself physically and emotionally exhausted due to his workload. His office has adopted a policy of not referring work to private attorneys on the alternate panel unless the office has an actual conflict of interest.

Attorney X believes that many of his cases require expert opinion on forensic issues in order to provide an adequate defense for his clients, but the public defender's budget is insufficient to retain expert witnesses on forensic issues. However, having been assigned to a case after having announced that he would be ready to proceed within the applicable time provisions under Penal Code section 987.05, the Judge has ordered Attorney X to proceed.

We are asked to review Attorney X's ethical duties.

DISCUSSION

I. The Duty to Perform Competently

Despite the circumstances in which he works, Attorney X remains obligated to fulfill his ethical obligations. These include the duty to act competently. Rule 3-110 of the Rules of Professional Conduct of the State Bar of California states in part: "(A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence. (B) For purposes of this rule 'competence' in any legal service shall mean to apply the 1) diligence, 2) learning and skill,

and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.”^{1/} Attorney X has an obligation “faithfully to discharge the duties of any attorney at law to the best of his knowledge and ability.” (Bus. & Prof. Code, § 6067.)

Because of his duty of competent representation, Attorney X should decline appointments to new cases if he reasonably determines he will not be ready to proceed with a defense under the time limits imposed by statute and by the court. *Segal v. State Bar* (1988) 44 Cal.3d 1077, 1084 [245 Cal.Rptr. 404]. Although indigent criminal defendants are entitled to appointed counsel under the Sixth Amendment of the United States Constitution and Article I, Section 15 of the California Constitution, an attorney has no duty to accept a case, and the court may not appoint an attorney to a case, unless the attorney announces, and the court finds, that the attorney will be ready for trial. (Penal Code, § 987.05.)

II. The Duty to Advise Clients of Significant Developments in Their Case

Attorney X may be required to advise a client of the restrictions on his ability to practice competently if these limitations are “significant developments” in the client’s case. (Bus. & Prof. Code, § 6068, subd. (m).) Rule 3-500 provides, “[a] member shall keep a client reasonably informed about significant developments relating to the employment or representation and promptly comply with requests for information.”^{2/}

In the opinion of the Committee, Attorney X’s belief that he cannot competently represent the defendant constitutes a “significant development” within the meaning of rule 3-500 and Business and Professions Code section 6068, subdivision (m). Under these facts, Attorney X should disclose to the client that he does not have the financial resources available to retain and present expert witnesses which may be critical for the defense, that there are certain items of evidence, witnesses, and scientific tests that he wishes to utilize but is unable to due to a lack of resources, and the effect of this inability on the ultimate outcome of the case. (See *Considine Co. v. Shadle, Hunt & Hagar* (1986) 187 Cal.App. 3d 760 [232 Cal.Rptr. 250] (attorney has duty to discuss material information with client).)

III. The Duty of Loyalty

Attorney X has an undivided duty of loyalty to each of his clients regardless of the circumstances. (*Flatt v. Superior Court* (1994) 9 Cal.4th 275, 289 [36 Cal.Rptr.2d 537]; *Yorn v. Superior Court* (1979) 90 Cal.3d 669, 675 [153 Cal.Rptr. 295].) This duty requires him to exercise independent judgment on behalf of each of his clients, and it precludes “. . . him from putting himself in a position where he may be required to choose between conflicting duties, . . . rather than to enforce to their full extent the rights of the interest which he should alone represent.” (*Anderson v. Eaton* (1930) 211 Cal. 113, 116 [293 P. 788].) Therefore, Attorney X may not neglect or abandon the defense of one client in order to focus only on the defense of other clients, whether he considers their cases more winnable or in some way more significant.

The duty of loyalty is measured not only by the comparative attention provided to different clients, but also to the faithful representation of a single client. “The duty of a lawyer both to his client and to the legal system, is to represent his client zealously within the bounds of the law.” (*Hawk v. Superior Court* (1974) 42 Cal.3d 108, 126 [227 Cal.Rptr. 817].) This means that Attorney X may not sit silently during a trial the court has ordered to begin in order to protest the restrictions placed on his defense of his client, even if he believes that his protest might benefit future clients by creating political or judicial pressure for change in the operations of his office. In *People v. McKenzie* (1983) 34 Cal.3d 616 [194

^{1/} Unless otherwise indicated, all rule references are to the Rules of Professional Conduct of the State Bar of California.

^{2/} American Bar Association Model Rule of Professional Conduct 1.4, although not binding on California attorneys, may be considered in these circumstances [rule 1-100]. Comment [2] to Model Rule 1.4 states: “The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client’s best interest, and the client’s overall requirements as to the character of representation.” [See also ABA Standard Criminal Justice, Prosecution and Defense Function (3rd Ed. 1993), Defense Function Standard 4-3.8 (requiring criminal defense lawyer to keep client informed of developments in case)].

Cal.Rptr. 462], the attorney proceeded to trial but sat idly, introducing only a sham defense. Although the defendant's conviction in that case was reversed, the court stated "... the existence of these admittedly adverse conditions [created by the uncooperativeness of the defendant and counsel's disagreement with the trial court's ruling on a substantive motion] does not relieve counsel of the duty to act as a vigorous advocate and to provide the client with whatever defense he can muster." *Id.* at p. 631.^{3/}

The Court in *McKenzie* explained that the failure of defense counsel to provide vigorous advocacy "... would be contrary to the attorney's obligation to 'faithfully to discharge the duties of any attorney at law to the best of his knowledge and ability.'" (Bus. & Prof. Code, § 6067.) It also said with regard to the trial court's order that the defense counsel participate in the trial: "'It is the imperative duty of an attorney to respectfully yield to the ruling of the court, whether right or wrong.'" [citing, among other sources, the duty of each attorney to maintain respect for the courts under (Bus. & Prof. Code, § 6068, subd. (b).] The Court suggested there is no discrepancy between the attorney's duty of loyalty to the client and respect to the court, on the one hand, and his duty of competence, on the other hand. "'If the ruling is adverse, it is not counsel's right to resist it or to insult the judge – his right is only respectfully to preserve his point for appeal' [citations omitted] If counsel builds a careful record and can demonstrate that he has been compelled to proceed with a case in which he was unprepared through no fault of his own, the matter can then be raised through the proper procedural channels.'" (*People v. McKenzie, supra*, 34 Cal.3d 616, 632.)^{4/}

IV. The Duty to Seek Withdrawal

In the event that Attorney X finds himself unable to competently represent his client, he owes an obligation to him to consider appropriate alternatives, for example, seeking a continuance or requesting that substitute or additional counsel be appointed. If all Attorney X's efforts prove unsuccessful, and he believes that his continued representation of a client "will result" in violation of his ethical obligations or "[t]he member's mental or physical condition renders it unreasonably difficult to carry on the employment effectively, he *must* seek to withdraw." (Rule 3-700(B)(2), (3), emphasis added.) He *may* seek to withdraw under the permissive provisions of rule 3-700 (C) if his continued representation of the client is "likely to result" in violation of his ethical duties, or if "[t]he member's mental or physical condition renders it unreasonably difficult to carry on the employment effectively."^{5/} (Rule 3-700(C)(2), (4).)

^{3/} This situation is different than that presented in *Hughes v. Superior Court* (1980) 106 Cal.App. 3d 1 [164 Cal.Rptr. 721], where the Court issued a writ of prohibition against a contempt citation. The assistant public defender, for the purpose of protecting his client's Sixth Amendment right to effective assistance of counsel and not as an act of protest, declined to proceed with a trial for which he had not announced himself "ready."

^{4/} The Court also stated that the trial court may consider warning counsel that his refusal to obey the Court's order might lead to the sanction of contempt and may be referred to the State Bar for investigation of possible discipline under Business and Professions Code section 6103 [requiring attorneys to obey court orders]. (*People v. McKenzie, supra*, 34 Cal.3d 616, 627 n.5.)

^{5/} For legal services attorneys, cutbacks in public funding may provide a valid basis to withdraw pursuant to Code of Civil Procedure section 282.5 (withdrawal may be proper if (a) no adequate public funds are available; (b) a good faith effort was made to find alternative representation; (c) all reasonable steps to reduce the legal prejudice to the client have been taken.). "To the extent that legal services attorneys find that the remaining caseload per attorney cannot adequately be handled, so that the interest of the clients may adversely be affected, the lawyers have an ethical obligation to take steps to assure adequate representation." (Cal. State Bar Formal Opn. No. 1981-64.) We are not aware that any statute has been enacted for criminal defense attorneys, and an attorney may not rely on that section in these circumstances.

CONCLUSION

Where an assistant public defender believes that he has inadequate time or resources to adequately prepare cases for trial, he must nonetheless comply with his ethical duties. These include the duties to act competently, and to advise clients of significant developments in their case, including anything that might interfere with the attorney's duty to provide an adequate defense, and the duty of loyalty to the client. The duties of competence and loyalty also may require the attorney to make a record in the trial court of those factors which might result in a reversal of a conviction based upon his own ineffective assistance as counsel.

In the event that the attorney believes that continued representation of a client would result in a violation of the California Rules of Professional Conduct or the State Bar Act, he must seek to withdraw.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Governors, any persons, or tribunals charged with regulatory responsibilities, or any member of the State Bar.